INDIAN-ESKIMO ASSOCIATION OF CANADA

A critical review of

THE NEW INDIAN POLICY AND NATIVE CLAIMS

by

Prof. Douglas Sanders.

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ional Office:
ian-Eskimo Association of Canada,
Victoria Street,
nto 200, Ontario.

Western Office:
Indian-Eskimo Association of Canada,
619 Revillon Building,
102 Ave. and 104 Street,
Edmonton 14, Alberta.

In the ten month period ending in May, 1969, the Federal Government held a series of eighteen consultation meetings. All across Canada Indian people were asked to consider specific amendments to the Indian Act. Yet when the Federal Government tabled their policy proposals in the House of Commons in June, 1969 they recommended the total repeal of the Indian Act. Something didn't make sense. The rules of the dialogue had been changed in mid-stream with no notice to the native people.

shows he has not researched

To my knowledge, the Government has never denied the allegation frequently made, that the text of the new policy, as released June 25th, must have been finalized before the last consultation meeting. If the accusation is true, the Federal Government listened patiently to a national assembly of Indian leaders state that treaty and aboriginal claims were of first importance to them. The Government listened although they had already abandoned the idea of an Indian claims commission and rejected any notion of aboriginal claims or of any continuing role for the treaties. This is neither dialogue nor consultation.

The fundamental concept in the new policy is equality. To those who have equality in fact or at least a good bargaining position, legal equality is a good thing. For those in a position of political and economic weakness, legal equality alone, serves the stronger interests in the society at the expense of the weak. To a group struggling to assert and protect a special identity, equality is a negative concept. This is why the new policy has met with such opposition by native spokesmen who represent unassimilated Indians.

The new policy can also be criticized much more specifically. It contains two notions stated as legal concepts, which appear to give some necessity to its proposals. They are:

(a) The division of powers in the British North America Act which makes Indians a Federal responsibility inherently leads to discrimination and inferior services. The separate legal status of Indians is charged with keeping the Indian people "apart from and behind other Canadians. The Indian people have not been full citizens of the communities and provinces in which they live..." This special status (inequality), it is said, has had wholly negative results.

(b) The legal basis for special Indian claims is untenable. The new policy states that treaties between groups within one society are "anomalous." Prime Minister Trudeau later called them "inconceivable." The treaties should be terminated. aboriginal claims (in non-treaty areas) are not real claims and are not to be "guaranteed" by the Government. Therefore these bases for special status (inequality), it is said, are without substance.

It is my view that both of these assertions are wrong.

The first assertion used to be true. It was probably never true by logical or legal necessity, but it was seen to be true. The division of powers, that bogey of Canadian life, placed the Indian in a special legal limbo, as unreachable as Senate reform or constitutional review. That seemed the dilemma ten years ago, but it is not the dilemma today. A 1959 provincial study led to Manitoba's pioneering community development program. There have followed numerous provincial programs directed at or including native peoples. Provincial legal aid and medicare plans include native peoples although limited special services had been provided in both areas by the Federal Government. The 1951 amendments to the Indian Act provided that, subject to treaties and the provisions of the Indian Act, all laws of general application in a province applied to Indians. The legal analysis of the Hawthorne-Tremblay report published in 1966 did much to dispel division of powers myths. But more significantly, the Federal Government has entered

into numerous inter-governmental agreements so that Provinces and local Governments now provide regular services to native people. By this mechanism the inadequate old school system has been ended and Indian children integrated into provincial schools. Yet now the new policy says that Indians are legally outside provincial and local services because of Federal jurisdiction. The Government seems to deny its own painstaking work to provide local services to native people. What has not been terminated or transferred is Federal financial responsibility, which is a different matter.

At least one member of the Government has stated publicly that the new policy of providing regular local services to native people is not new. No policy change is required to bring it about. The Indian act is no barrier and neither is the division of powers.

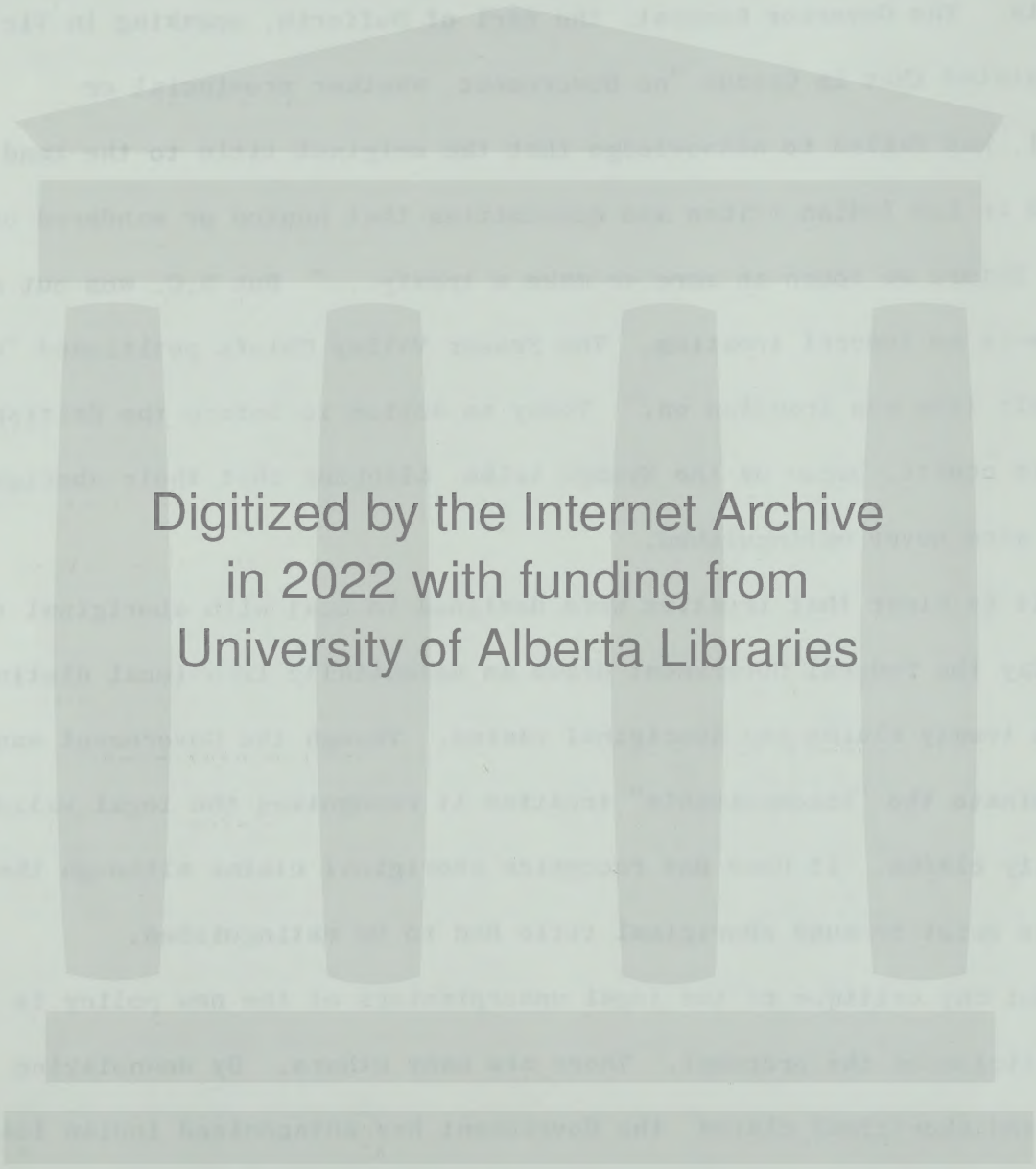
The second assertion is quite different: treaties between groups in a society are anomalous or inconceivable. These inconceivable documents were willingly entered into by the Federal Government from 1871 down to 1956. They were sought not only for political and pragmatic reasons, but clearly, from Governmental records, for legal reasons. The native peoples had an Indian or aboriginal title to their tribal lands which was to be extinguished by the legal mechanism of treaty. In 1872 the Hon. Mr. Mackenzie stated in the House that treaty payments to Indians were not gratuities "but the money involved in a bargain and sale of property transferred by them to the Dominion." In 1906 Sir Wilfred Laurier signed an order in council appointing treaty commissioners on the basis "that the aboriginal title has not been extinguished" in a particular area of the west. In 1923 treaties were entered into in Southern Ontario, in the words of the commissioners, to extinguish remaining Indian title. These are three arbitrarily chosen references. It is clear that the Federal Government

not only recognized the aboriginal claims of Indians, but those of half-breeds as well (by the provisions of the Manitoba Act and the Dominion Lands Act). There were protracted disputes between the Federal Government and British Columbia, which, before entering Confederation, had developed an anti-treaty policy. The Federal Government wanted treaties covering British Columbia. The Governor General, the Earl of Dufferin, speaking in Victoria 1873, stated that in Canada "no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and communities that hunted or wandered over them. Before we touch an acre we make a treaty..." But B.C. won out and there were no federal treaties. The Fraser Valley Chiefs petitioned "we have felt like men trampled on." Today an action is before the British Columbia courts, begun by the Nishga tribe, alleging that their aboriginal rights were never extinguished.

It is clear that treaties were designed to deal with aboriginal title. Yet today the Federal Government draws an essentially irrational distinction between treaty claims and aboriginal claims. Though the Government wants to terminate the "inconceivable" treaties it recognizes the legal validity of treaty claims. It does not recognize aboriginal claims although the treaties exist because aboriginal title had to be extinguished.

But any critique of the legal underpinnings of the new policy is only one criticism of the proposal. There are many others. By downplaying treaty and aboriginal claims the Government has antagonized Indian leaders in all areas of this country. The fear that the proposals are a warmed-over version of the U.S. termination policy has frightened many Canadians who know the disasters of that policy.

A 1961 U.S. governmental study noted the polarizing effects of their termination policy. "Now many Indians see termination written into every



new bill and administrative decision and sometimes are reluctant to accept help which they need and want for fear that it will carry with it a termination requirement." A 1969 governmental study commissioned by President Nixon, states that the termination issue still "poisons" Indian affairs and causes almost every act of the government to be viewed with suspicion. This U.S. experience has portents for Canada. Certain native leaders already see any administrative change as an underhanded attempt to implement the new policy. Polarization is occurring.

The Government has suggested that the much abused Department of Indian Affairs be phased out of existence. This would be more surprising if it had not also been a part of the U.S. termination policy rhetoric. The parallel U.S. bureaucracy continued to grow during the period it was officially committed to working itself out of business. Our new policy has skillfully trapped Indian organizations into supporting Indian Affairs as it exists in their concern to oppose the new policy.

In Canada we once had a rather parochial pride in our Indian policy. In 1871 there were cheers in our House of Commons for the statement that our policies when compared to those of the United States were "not only just and generous, but successful." It is a long time since we have felt this way.

The native people seem to be insisting that our Federal Government live up to its constitutional responsibilities. For many year the U.S. Government also tried to make the Indians "citizens" of the States and get out of the Indian business. The failure of that approach led President Johnson in 1968 to state "we must assure the Indian people that it is our desire and intention that the special relationship between the Indian and his government grows and flourishes." Will we learn the lessons that led to this striking reversal of U.S. official policy?

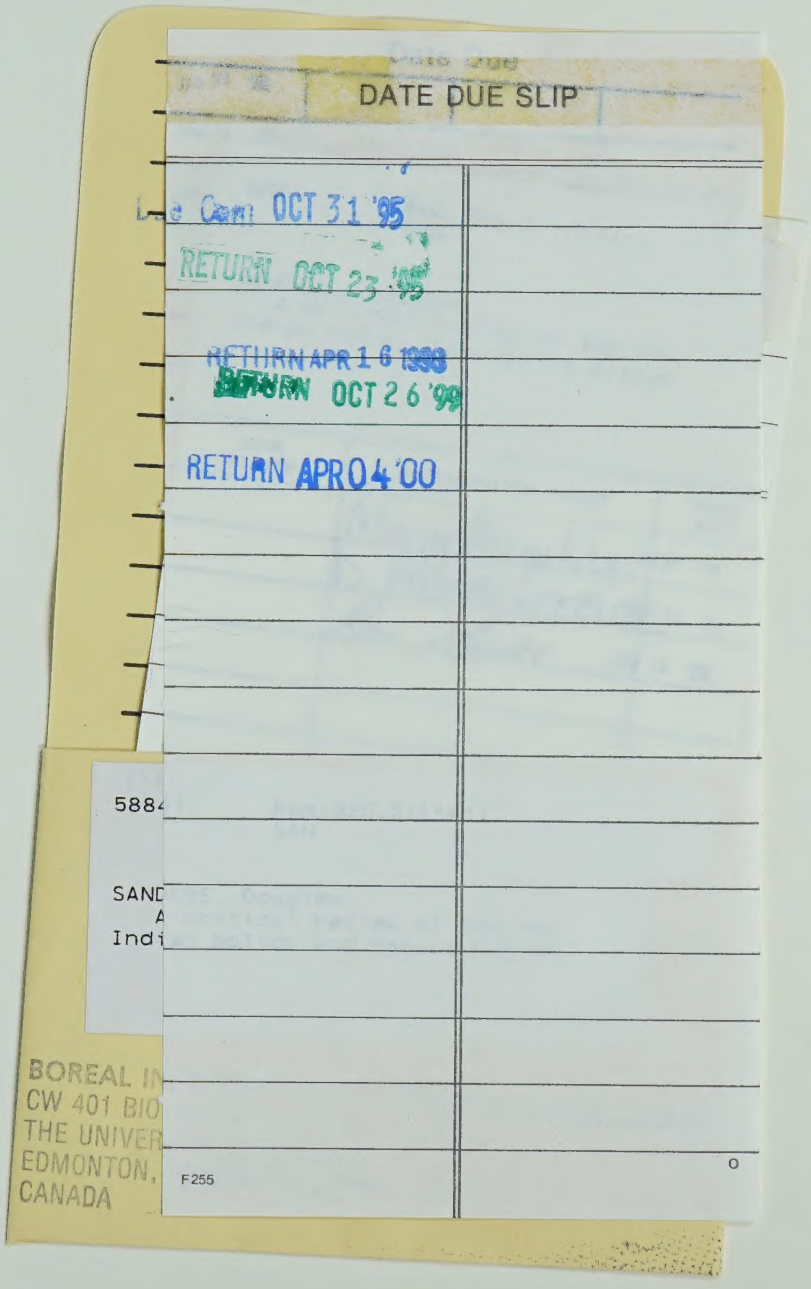
The native people seem to be asking that we come to terms with our own past and acknowledge their historic and continuing place in Canadian society. We have recognized a parallel claim by French Canada. Canadian Welfare magazine editorialized: "...it is strange that at the very time that our Government has stressed the historic constitutional rights of the second "founding race" we should be asked to dismiss the very notion of aboriginal rights or the concept of Indian treaties as anything more than agreements between "one section of our society and another section of our society."

But, with all that, the basic criticism of the new policy must be that it is unimaginative. There are no suggestions for special programs like the Institute of American Indian Arts, or the Indian Law Center at the University of New Mexico, or legal services programs such as Dinebeiina Nahilna Be Agaditahe on the Navajo Reservation. The Indian projects of the American poverty program constituted a "momentous breakthrough", in the words of the report to President Nixon. Tribes framed their own programs and for the first time on a significant scale managed the programs and funds allocated to them. "Most importantly Indian initiative had been mobilized and encouraged, and the new self-assurance was soon reflected in increasing demands by the Indians to the Bureau of Indian Affairs and other agencies of government that the tribes be allowed to play decisive roles in determining their own needs and developing their own programs."

We should be studying the American programs and innovating for ourselves. The Indian Association in Alberta has advanced a proposal for an Indian educational centre. We desperately need innovations in education for present evidence indicates that the integrated schools are failing the Indians educationally. Education should be neither a directed agent of assimilation or a means of repression; which, to put it harshly, has been the choice to date.

The U.S. under Kennedy abandoned "termination" for programs to develop reserves. Our Federal Government suggests that we end our programs to develop reserves in favour of termination. A Cherokee anthropologist commented that our new policy reminded him of a re-run of an old movie. He said it would be amusing if it weren't so tragic.

The new policy is insensitive, inaccurate and unimaginative. Surely we can do better.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